APPENDIX A

United States Court of Appeals,
Federal Circuit.

EXTREME NETWORKS, INC., Plaintiff-Cross Appellant,

v.

ENTERASYS NETWORKS, INC., Defendant-Appellant.

Nos. 2009-1325, 2009-1346.
Sept. 30, 2010.
Rehearing and Rehearing En Banc Denied Dec. 20, 2010.
Rehearing Denied Dec. 29, 2010.

Appeals from the United States District Court for the Western District of Wisconsin in case no. 07-CV-229, Chief Judge Barbara B. Crabb.Margaret M. Duncan, McDermott Will & Emery LLP, of Chicago, Illinois, argued for plaintiff-cross appellant. With her on the brief were David L. Larson, of Menlo Park, California; and Joel M. Freed, Natalia V. Blinkova, and Bureden Warren, of Washington, DC.

David P. Swenson, Robins, Kaplan, Miller & Ciresi L.L.P., of Minneapolis, Minnesota, argued for defendant-appellant. With him on the brief were Scott M. Flaherty; and Christopher P. Sullivan, William J. Rocha, Rebecca A. MacDowell and Alan E. McKenna, of Boston, Minnesota.

Before RADER, Chief Judge, and LOURIE and PROST, Circuit Judges.

RADER, Chief Judge.

Extreme Networks, Inc. ("Extreme") and Enterasys Networks, Inc. ("Enterasys") accuse each other of patent infringement. The United States District Court for the Western District of Wisconsin granted summary judgment of non-infringement of Enterasys's patents: U.S. Patent Nos. 5,430,727 ("'727 patent") and 5,195,181 ("'181 patent"). *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, 558 F.Supp.2d 909, 924 (W.D.Wis.2008). Before proceeding with trial on Extreme's infringement claims, the district court granted Extreme's motion to exclude Enterasys's expert from testifying. *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, No. 07-cv-229, 2008 WL 4621440, at *2 (W.D.Wis. May 16, 2008). After the jury trial, the district court entered a final judgment of infringement against Enterasys, but denied Extreme's motion for attorney fees. *See Extreme Networks, Inc. v. Enterasys Networks, Inc.*, No. 07-cv-229, 2008 WL 4756498, at *6-7 (W.D.Wis. Oct. 29, 2008).

Because the district court erroneously construed the contested limitation "digest of information," this court vacates the summary judgment as to the ' 181 patent. This court also vacates the denial of Extreme's motion for attorney fees. In all other respects, this court affirms.

I

The '727 patent-"Multiple Protocol Routing"-issued on July 4, 1995, based on a May 19, 1994 application. The '727 patent covers a "brouter," which can operate both as a bridge and a router. Claims 5, 6, and 7 of the '727 patent are at issue on appeal. Claim 5 is representative and recites:

> A device which is capable of acting as a router to forward to and from end systems user data packets and is capable of acting as a bridge to forward between networks user data packets, said device comprising
>
> router circuitry causing said device to act as a router recognizing and forwarding user data packets conforming to a first protocol suite,
>
> *bridge circuitry causing said device to act as a bridge recognizing and forwarding user data packets conforming to at least a second protocol suite,*
>
> control circuitry causing said device to act as a bridge rather than as a router for a user data packet which conforms to said first protocol suite and is addressed to a single address which is not an address of the device.

'727 patent col. 60 ll. 20-34 (emphasis added). Claims 6 and 7 depend from claim 5.

The '181 patent-"Message Processing System Having Separate Message Receiving and Transmitting Processors with Message Processing Being Distributed Between the Separate Processors"-issued on March 16, 1993, based on a January 10, 1992 application. The '181 patent provides a scheme for partitioning workload between receive and transmit processors so that a data packet can quickly and efficiently move through a multiprocessor system. Each receive processor collects information relating to the network protocol processing of a particular data packet into a "digest." '181 patent col. 4 ll. 57-62. "The information placed in the digest comprises information that is necessary for the completion of the processing tasks to be performed by the [transmit processors]." *Id.* col. 4 ll. 62-65.

Claims 1, 6, and 7 of the '181 patent are at issue on appeal. Claim 1 is representative and recites:

> A computer system for transmitting messages in a computer network, which comprises:
>
> > a message receiving processor adapted to receive messages from the computer network;
> >
> > a separate message transmitting processor coupled to the message receiving processor;
> >
> > the message receiving processor operating to perform first preselected

> processing of a message received by the message receiving processor and to generate a *digest* of information relating to the message, *the digest containing network protocol processing information for message transmit processing;*
>
> the message receiving processor transmitting the message and the *digest* o [sic] the message transmitting processor;
>
> the message transmitting processor operation to perform second preselected processing of the message using the network protocol processing information in the *digest*.

'181 patent col. 12 ll. 50-68 (emphases added).

II

On April 20, 2007, Extreme sued Enterasys alleging infringement of three Extreme patents. On May 30, 2007, Enterasys counterclaimed, alleging infringement of the '727 patent, the '181 patent, and a third patent, which Enterasys later voluntarily dismissed. On May 5, 2008, 558 F.Supp.2d 909, the district court granted summary judgment of noninfringement of the ' 727 patent based on its construction of the terms "acting as a bridge" and "bridge circuitry." The district court also granted summary judgment of noninfringement of the '181 patent based on its construction of the term "digest." The district court thus disposed of Enterasys's

infringement claims.

Before holding a trial on Extreme's infringement claims, the district court granted Extreme's motion in limine to preclude Enterasys's expert Barbara Frederiksen from testifying in support of its noninfringement and invalidity defenses. Extreme obtained a verdict in the amount of $201,213. The district court denied Extreme's motion for attorney fees.

Enterasys appeals the district court's grant of summary judgment of non-infringement of the '727 and '181 patents and its decision to exclude Frederiksen's expert testimony. Extreme cross-appeals the denial of its motion for attorney fees.

III

As an initial matter, Extreme argues that this court does not have jurisdiction over this appeal because Enterasys's notice of appeal was untimely. The district court entered judgment on November 5, 2008. The parties then filed post-trial motions, including motions to calculate pre-judgment interest, post-judgment interest, and supplemental damages. The district court entered an order disposing of all such motions on March 16, 2009. The court clerk entered an amended judgment on March 19, 2009. Enterasys filed its notice of appeal on April 17, 2009. Extreme argues that the November 5, 2008 order was a final judgment and that the time to file an appeal re-started on March 16, 2009. If Extreme's assumptions were correct, Enterasys's notice of appeal, which was filed more than thirty days after

the March 16, 2009 order, would be untimely.

A final judgment "ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judgment." *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1311 (Fed.Cir.2009) (citation omitted). Where substantive issues remain unresolved, a "judgment standing alone as issued by the district court [is] insufficient to establish dismissal of the entire action and ... could not be the basis for providing [the Federal Circuit] with subject matter jurisdiction." *SafeTCare Mfg., Inc. v. Tele-Made, Inc.*, 497 F.3d 1262, 1267 (Fed.Cir.2007).

"Prejudgment interest is an element of complete compensation." *West Virginia v. United States*, 479 U.S. 305, 310, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987). "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *Id.* at 310 n. 2, 107 S.Ct. 702. Therefore, courts should calculate prejudgment interest before determining the amount of damages that would fully compensate the patentee for the infringer's use of the patented invention.

The November 5, 2008 judgment did not constitute a final judgment because it left unresolved prejudgment interest, even though the parties had previously notified the district court of their unresolved dispute over its calculation. The district court did not calculate prejudgment interest until

the March 16, 2009 order. Because the March 19, 2009 amended judgment resolved all pending issues, under the facts of this case, it is the only final judgment. Because Enterasys filed its notice of appeal within thirty days thereafter, this court has jurisdiction.

IV

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56. Thus, a court may grant summary judgment "when no reasonable jury could return a verdict for the nonmoving party." *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, 563 F.3d 1358, 1365 (Fed.Cir.2009) (citations omitted). This court reviews a grant of summary judgment of non-infringement without deference. *O2 Micro Int'l, Ltd. v. Monolithic Power Sys.*, 467 F.3d 1355, 1359 (Fed.Cir.2006). This court also reviews claim construction without deference. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456 (Fed.Cir.1998) (en banc).

Claims 5, 6, and 7 of the '727 patent include the limitation: "bridge circuitry causing said device to act as a bridge recognizing and forwarding user data packets conforming to at least a second protocol suite." '727 patent col. 60 ll. 20-39. The district court held that the brouter "recognizes" the type of protocol suite to which a data packet belongs and decides whether to forward the data packet as a

bridge or a router based on the protocol suite. The district court granted summary judgment of non-infringement because it found that the accused Extreme devices do not base their decisions on the protocol suite.

The district court correctly construed the "bridge circuitry" limitation. The parties agree that the brouter has some decision-making capabilities. The claim language implies that the recognition of the second protocol suite triggers the brouter's decision to act as a bridge or a router because it does not specify any other criteria by which the brouter can determine how it will forward the data packets.

The specification supports this interpretation of "bridge circuitry." The only disclosed embodiment of a brouter "is arranged to treat TCP/IP packets as if the router were a normal IP router and to treat all other packets as if the router were a bridge." '727 patent col. 50 l. 67-col. 51 l. 2. The brouter treats a data packet conforming to TCP/IP by routing it and a data packet conforming to a different protocol suite by bridging it. The specification does not disclose any other basis for deciding whether to route or bridge a data packet. Although this court must be careful not to read an embodiment into a claim, the specification of the '727 patent supports the causal connection between the recognition of the data packet's protocol suite and the determination whether to act as a router or a bridge. Accordingly, the district court correctly held that the claimed brouter must make a decision whether to bridge or route a data packet based on the protocol suite to which the data packet conforms.

Enterasys also argues that there is a genuine issue of material fact as to how Extreme's accused devices decide whether to route or bridge a data packet. In its summary judgment motion, Extreme argued that its devices forward the incoming data packets regardless of their protocol suites. In response, Enterasys merely alleged that the accused devices ascertain the data packets' protocol suites before routing or bridging them. Enterasys made no attempt to establish that the determination of the protocol suite has any bearing on the devices' decision to "act as a bridge." Accordingly, there is no genuine issue of material fact.

Finally, Enterasys argues it is entitled to pursue additional discovery on Extreme's devices because the district court changed its claim construction of "bridge circuitry" over time. The district court did not change its construction of "bridge circuitry." Also, this court finds that Enterasys could have conducted its discovery in anticipation of the final claim construction. Enterasys never sought relief on the ground that it had been unable to obtain the necessary discovery to dispute that Extreme's devices do not use the protocol suite in deciding how to forward data packets. Enterasys had a full opportunity to take the discovery it now demands. Thus, Enterasys is not entitled to additional discovery. Accordingly, this court affirms the summary judgment of non-infringement of the '727 patent.

V

Claims 1, 6, and 7 of the '181 patent recite: "the message receiving processor ... to generate *a digest of information* relating to the [received] message, the digest containing network protocol processing information for message transmit processing." '181 patent col. 12 ll. 50-68, col. 14 ll. 18-43. The district court explained in its summary judgment order that because the digest "contain[s]" network protocol processing information, "the digest is a structure and not the contents of the structure." *Extreme Networks*, 558 F.Supp.2d at 920. The district court granted summary judgment of non-infringement based on Enterasys's alleged concession that Extreme's devices do not have such a structure.

The parties agree that the term "digest" does not have a specific definition in the relevant art. The term "digest" ordinarily means a collection of information. *See* Merriam-Webster's Collegiate Dictionary (10th ed.1993) (defining "digest" as "a summation or condensation of a body of information"); Random House Webster's College Dictionary (1991) (defining "digest" as "a collection or compendium, as of literary or scientific matter, esp[ecially] when classified or condensed"). A "digest," which is a condensation of a body of information relating to the received message, would logically be a set of data rather than a structure containing that data. The district court erred by focusing on the claim term "containing" and concluding that something "containing" information cannot also be information. To the contrary, the term "containing" does not indicate whether the "digest" is

a structure or the contents of a structure.

Moreover, the following passage in the specification clarifies that a "digest" is a collection of information relating to network protocol processing of a particular message:

> [T]he present invention arranges each [receiving processor] to *collect, into a digest, information relating to network protocol processing of a particular message,* obtained via sequential byte processing of the message at the time of reception of the message.... *[This] digest can include, for example, certain information* from the data link layer header of a received message. *The data link information can include, for example, last hop information* that is used by the processor of the transmitting line interface card in the transmission of the message."

'181 patent col. 4 ll. 57-62, col. 4 l. 68-col. 5 l. 5 (emphases added). "[The] digest can include ... certain information" just like "[t]he data link information can include ... last hop information." *Id.* This parallel language further suggests that the digest, like the data link information, is information. Specifically, the digest contains "network protocol processing information" that is related to processing of the message but may contain other information that could assist other processors in processing the message. Accordingly, this court vacates the summary judgment of non-infringement of the '181 patent.

VI

Enterasys has the burden of establishing that Frederiksen's expert testimony is admissible based on her "knowledge, skill, experience, training, or education" in the relevant technology. Fed.R.Evid. 702. Courts must determine whether expert testimony is reliable by assessing whether the expert is qualified in the relevant field. *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir.2000). A district court's decision to preclude expert testimony is an evidentiary issue, which this court reviews under the law of the regional circuit. *Research Corp. Techs. v. Microsoft Corp.*, 536 F.3d 1247, 1255 (Fed.Cir.2008). The U.S. Court of Appeals for the Seventh Circuit reviews evidentiary rulings for an abuse of discretion. *Von der Ruhr v. Immtech Int'l, Inc.*, 570 F.3d 858, 862 (7th Cir.2009).

The district court did not abuse its discretion by excluding Frederiksen's testimony on the ground that she was not qualified as an expert in the relevant art. Both parties agree that a person of ordinary skill in the art pertinent to Extreme's patents would have a substantial background in switches, bridges, and routers. Frederiksen opined that an ordinary artisan was:

> An individual with a Bachelor of Computer Science or computer engineering degree, or equivalent experience, and 2-3 years experience in the computer industry *working on the design or development of high speed switches, bridges, or routers* for wide area networks (e.g. frame relay, ATM); local area

> networks (e.g. Ethernet, FDDI, token ring, etc.); or military networks.

(J.A. 1350-01 (emphasis added)). Extreme's expert, Dr. Nathaniel Davis, identified a similar set of criteria for defining the person of ordinary skill, although his definition included somewhat more industry experience.

Frederiksen would not qualify as a person of ordinary skill in the relevant art even under her own proposed definition. Frederiksen received an Associate of Applied Science degree in Computer Programming. She worked as a system administrator for several corporations, but she never seems to have worked on "the design or development of high speed switches, bridges, or routers." General experience in a related field may not suffice when experience and skill in specific product design are necessary to resolve patent issues. *See, e.g., Flex-Rest, LLC v. Steelcase, Inc.*, 455 F.3d 1351, 1360-61 (Fed.Cir.2006) (affirming exclusion of an ergonomics expert where the invention at issue related to an ergonomic keyboard design). Therefore, the district court did not abuse its discretion by ruling that Frederiksen was an unqualified expert.

VII

This court affirms the summary judgment of noninfringement of the '727 patent and the decision to exclude Frederiksen's expert testimony. This court vacates the summary judgment of non-infringement of the '181 patent and thus vacates the denial of Extreme's motion for attorney fees as premature

given the fact that infringement of the '181 patent may need to be redecided. This court remands the case for further proceedings consistent with the opinion.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

EXTREME NETWORKS, INC.,

Plaintiff,

v.

ENTERASYS NETWORKS, INC.

Defendant.

OPINION AND ORDER

07-cv-229-bbc

A jury found that several routers sold by defendant Enterasys Networks, Inc. infringed one or more of three patents owned by plaintiff Extreme Networks, Inc. relating to management of network traffic: U.S. Patents Nos. 6,104,700, 6,678,248, and 6,859,438. After the verdict, defendant renewed its motion for judgment as a matter of law under Fed. R. Civ. P. 50 and plaintiff moved for a permanent injunction and attorney fees. For the reasons stated below, the motions for judgment as a matter of a law and attorney fees will be denied; the motion for a permanent injunction will be granted in part.

A. Defendant's Motions for Judgment as a Matter of Law

The first question is whether defendant properly preserved all of the arguments it raised in its Rule

50(b) by first asserting them in one of its Rule 50(a) motions. Plaintiff says that defendant waived the following arguments in its Rule 50(b) motion:

- plaintiff failed to show during trial that the weighted fair queuing and bw-limit functions of the Matrix router satisfy the "QoS metric" limitation in claim 15 of the '248 patent;

- plaintiff failed to show during the trial that any of the accused products "remove the data packet from the queue if a difference between the current measure and the minimum QoS falls within a threshold," as required by claim 15 of the '248 patent;

- plaintiff failed to show that the Expedition router has a "scheduler as required by claim 5 of the '438 patent;

- plaintiff failed to show at trial that the Matrix router is designed for use in a network employing a non-deterministic access protocol, as required by claim 21 of the '700 patent.

I agree with plaintiff that defendant did not raise any of these arguments in its Rule 50(a) motions, which means it may not assert them now. Laborers' Pension Fund v. A St C Environmental, Inc., 301 F.3d 768 (7th Cir. 2002); Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1363-64 (7th Cir. 1996); Downes v. Volkswagen of America, Inc., 41 F.3d 1132, 1139-40

(7th Cir. 1994). Defendant argues that its Rule 50(a) motions were sufficient because in each of them it argued that plaintiff had failed to meet the same claim elements that it identifies as deficient in its Rule 50(b) motion. The rule itself makes it clear that defendant is wrong. A Rule 50 motion must "specify . . . the law and facts that entitle the movant" to judgment as a matter of law. Fed. R. Civ. P. 50(a)(2). In other words, the motion must be specific enough to give notice to the plaintiff of the hole in its case so that it can attempt to put in more evidence while there is still an opportunity to do so. Defendant cannot preserve all possible arguments simply by listing the elements of a claim and arguing generally that the plaintiff did not meet them. This gives the plaintiff no notice of the law *or* facts that might entitle defendant to judgment as a matter of law.

Defendant raised several other arguments for the first time in its reply brief; those arguments are waived as well.

The only argument advanced by defendant that it did not forfeit is that plaintiff failed to adduce sufficient evidence that the Matrix X and X-Pedition routers provide a "minimum bandwidth" or "minimum QoS" as required by claim 15 of the '248 patent, claim 5 of the '438 patent and claims 21 and 29 of the '700 patent. The record at trial on these questions was little different from summary judgment. Plaintiff relied again on the documents created by defendant as well as Broadcom, the manufacturer of the chips in defendant's products. Plaintiffs expert, Daniel Davis, testified that these documents showed that the weighted fair queuing

function of defendants' products satisfied the "minimum QoS" and "minimum bandwidth" elements. Although defendant disagrees with that expert's assessment, it fails to show that the jury was not entitled to credit the testimony.

Defendant also challenges the jury's award of $201,213 in compensatory damages. Although it was not required to, the jury wrote that it was awarding $67,071 "for each of the three patents infringed." Defendant argues that the jury should not have awarded an equal amount of damages for each patent because the X-Pedition routers were not an accused device with respect to the '700 patent.

The problem with this argument is that it ignores the standard of review. To side with defendant on this issue, I would have to find that no rational jury could have found that plaintiff was entitled to $67,071 for the defendant's infringement of the '700 patent. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151 (2000); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Defendant does not acknowledge this standard, much less develop an argument that it has been met. Rather, defendant simply assumes that the jury used identical methodology in awarding damages for each patent. However, that is not an assumption defendant is entitled to make: the jury did not disclose its methodology and the verdict form did not require it to. Because defendant fails to develop an argument that no rational jury could have awarded the damages it did for the infringement of the '700 patent, that argument is waived.

B. Plaintiff's Motion for a Permanent Injunction

The same standard for obtaining a permanent injunction applies in patent cases as in any other case. The plaintiff must show that (1) it has suffered an irreparable injury; (2) the remedies available at law are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

Defendant fills a 40-page brief with reasons it believes the court should not grant an injunction, but a number of them are simply reargruments of the merits or are otherwise unrelated to the four-part test from eBay. I have disregarded these. With respect to the factors that are relevant to determining whether injunctive relief is appropriate, it is undisputed that plaintiff and defendant are competitors in the router market and that plaintiff's routers embody the patented technology. Thus, this case is little different from Innogenetics, N.V. v. Abbott Laboratories, 2007 WL 4960850, *25 (W.D.Wis. 2007), in which I concluded that a patent owner had shown irreparable harm and an inadequate remedy at law because the parties were competitors. I noted that a "plaintiff is harmed when defendant sells directly competing products. . . . [I]ts reputation and market share are at stake. Its consumer base sees the products as plaintiffs. Its reputation for innovation and being a market leader are affected when defendant cuts into its market

share. . . . Plaintiff has shown that money damages alone would not remedy its injury." Id. at *25-26. The facts are the same in this case with one important exception: the jury did not award plaintiff damages for future violations as the jury in Innogenetics did. It was because the jury awarded damages for a "long-term license to sell [accused] products" in that case that the court of appeals concluded that a permanent injunction was unnecessary. Innogenetics, N.V. v. Abbott Laboratories, 512 F.3d 1363, 1379-80 (Fed. Cir. 2008). In this case, defendant identifies no long-term license fee that would make plaintiff whole.

Further, defendant identifies no unfair hardship it would experience or any disservice to the public interest that would occur if a properly tailored injunction was issued. Although it is true that in eBay, the Court held that an injunction should not issue automatically in every case of infringement, the reasons identified by several of the justices for denying injunctive relief are not present in this case. E.g., eBay, 547 U.S. at 396 (Kennedy, J., concurring) (damages may be sufficient when plaintiff "use[s] patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees")

The remaining question is what the scope of the injunction should be. Plaintiff has proposed the following order with respect to injunctive relief:

> Additionally, the Court finds that a PERMANENT INJUNCTION for Enterasys' infringement of the '700, '248 and '438

patents is warranted. Accordingly, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

1. Enterasys and its subsidiaries, parents, affiliates, officers, directors, agents, servants, representatives, attorneys, employees, licensors, licensees, successors in interest and assigns, and those persons in active concert or participation with them who receive actual notice of this Order (collectively, "Enterasys"), are hereby restrained and permanently enjoined, pursuant to Federal Rule of Civil Procedure 65(d) and 35 U.S.C. § 283, from manufacturing, using, offering to sell, or selling in the United States, or importing into the United States, (i) the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products ("the Accused Products"), either alone or in combination with any other product; (ii) any switch, router or data packet forwarding device capable of performing traffic shaping and/or weighted fair queuing in a manner substantially similar to the Accused Products; and (iii) any other existing or future product that is not more than a colorable variation of the Accused Products (the products described in (i), (ii) and (iii) above are collectively referred to as "the Infringing Products").

2. Enterasys is further restrained and permanently enjoined from making, using, offering to sell, or selling in the United

States products or services associated with the Infringing Products, or products or services that are not more than colorable variations thereof (collectively, the "Related Infringing Products and Services").

3. Enterasys is further restrained and permanently enjoined from inducing infringement of the Infringed Claims by encouraging, supporting, aiding, or abetting the manufacture, use, offer for sale, sale or importation for sale of the Infringing Products and/or the Related Infringing Products and Services in the United States.

4. Enterasys is further restrained and permanently enjoined from contributing to the infringement of the Infringed Claims by manufacturing, using, offering for sale, selling or importing for sale the Infringing Products and/or the Related Infringing Products and Services in the United States.

5. Enterasys shall destroy its existing inventory of the Infringing Products within ten days of this Order.

6. If Enterasys intends to make, use, sell, or offer for sale in the United States, or import into the United States, a switch, router or data packet forwarding device that it contends does not infringe the Infringed Claims, Enterasys shall, sixty (60) days prior to offering for sale the product to a U.S. customer, (i) make the product available for

Extreme Networks' inspection; and (ii) provide sufficient documentation relating to the product as reasonably requested by Extreme Networks, pursuant to the terms of the Protective Order in this case.

7. Within ten days of this Order, Enterasys shall provide written notice of this Order, and the injunction ordered herein, to its subsidiaries, parents, affiliates, officers, directors, agents, servants, representatives, attorneys, employees, licensors, licensees, successors in interest and assigns, and those persons in active concert or participation with them, including any and all manufacturers, distributors, retailers, and service providers who have been involved in the making, using, selling, offering for sale or importing of any Infringing Products in the United States since April 20, 2007; all other persons or entities involved in anyway with the making, using, selling, offering for sale or importing of any Infringing Products in the United States since April 20, 2007; and all entities that have purchased the Infringing Products in the United States.

8. Enterasys shall take whatever means are necessary or appropriate to ensure that this Order is properly complied with.

9. This injunction shall run until the expiration of the Extreme Networks' patents, which is February 3, 2018, with

respect to the '700 and '438 patents, and March 16, 2020, with respect to the '248 patent.

10. This Court retains jurisdiction over Enterasys to enforce any and all aspects of this Order for Final Judgment and Permanent Injunction.

11. The Court further retains jurisdiction to award Extreme Networks amounts for supplemental damages, interest, costs, attorneys fees and such other or further relief as may be just and proper.

12. This is a Final Judgment and is appealable.

I agree with defendant that the injunction is overbroad in its current form. The reason is simple: the scope of an injunction must be tailored to the scope of the violation found. e360 Insight v. The Spamhaus Project, 500 F.3d 594, 604 -605 (7th Cir. 2007).

In this case, the jury found only that a limited subset of defendant's products infringed several claims of plaintiff's patents. It did not find that its patents covered "any switch, router or data packet forwarding device capable of performing traffic shaping and/or weighted fair queuing," that any "products or services associated with the" accused products constituted infringement or that defendant had engaged in indirect infringement of any kind. Thus, the portions of plaintiff's proposed order seeking to enjoin defendant from engaging in these

activities must be deleted. (The Court of Appeals for the Federal Circuit has held that the injunction may extend to products "not more than colorably different from the adjudicated" products, International Rectifier Corp. v. IXYS Corp., 383 F.3d 1312, 13 16 (Fed Cir. 2004), so I have left that language in the order.)

Plaintiff says that the injunction should extend beyond what the jury found because plaintiff declined to litigate claims for indirect infringement "in order to streamline the trial." Dkt. #411, at 20. Apparently, plaintiff's argument is that it should receive a free pass at proving a violation because it was motivated by altruism. But it makes no difference whether plaintiff decided to drop these claims as an act of deep concern for the court and the jury, a calculated trial strategy or simply a realization that it could not win the claims. The point is that plaintiff did not press the claims and it must live with the consequences of that choice.

I also agree with defendant that the list of entities and person it seeks to enjoin is too broad. Rule 65 permits an injunction to extend to "the parties," "the parties' officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation with" the listed persons. The injunction will be limited accordingly.

Plaintiff does not even try to defend its proposed paragraph six, which requires defendant to allow plaintiff to inspect any future "switch, router or data packet forwarding device," or the proposed requirement that defendant provide notice of the

order to "all other persons or entities involved in any way with the making, using, selling, offering for sale or importing of any Infringing Products in the United States since April 20, 2007; and all entities that have purchased the Infringing Products in the United States." Those provisions are overbroad and will be omitted.

I do not agree with the remaining objections raised by defendant. First, defendant says that the injunction should not apply to the X-Pedition routers because it no longer manufactures or sells those routers. This is an argument that the need for an injunction is moot. Plaintiff's burden in prevailing on that argument is "a heavy one." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). It would have to show that it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 609 (2001) (internal quotations omitted). See also Global Relief Foundation, Inc. v. O'Neill, 315 F.3d 748, 751 (7th Cir. 2002) (case was not moot "while any possibility remained" that defendant would revert to past conduct). Because defendant has not met this burden (or even attempted to), I decline to exclude the X-Pedition routers from the scope of the injunction.

Also, the proposed order to destroy the accused products that remain in defendant's inventory is similar to the one in Innogenetics. Defendant identifies no noninfringing uses for these products, so there is no valid reason to keep them. However, I agree with defendant that the order should run from

the final resolution of any appeal by defendant rather than from the date of this opinion.

D. Attorney Fees

Plaintiff seeks attorney fees under 35 U.S.C. § 285 and 28 U.S.C. § 1927. Perhaps not surprisingly, plaintiff devotes more pages to this issue than it does to any other. Unfortunately, what plaintiff and so many other prevailing parties do not seem to realize is that attorney fees are not awarded as a matter of course in patent cases. Sections 285 and 1927 are not fee shifting statutes like 42 U.S.C. § 1988. They are sanctions for asserting a frivolous position or engaging in serious misconduct before the court or the PTO. Counsel waste their own time and their client's money when they file motions under these statutes in run-of-the-mill cases or cases in which both sides engaged in questionable litigation tactics.

Section 285 applies to "exceptional" cases only. There was nothing "exceptional" about this case, at least nothing that would warrant an award of attorney fees to plaintiff. Both sides were equally tenacious. Although plaintiff may have carried the day in most respects, this does not mean automatically that defendant's positions had no merit. Plaintiff points to a number of arguments made by defendant that were criticized by the court, but if this were enough to justify fees under § 285, plaintiff would be in little better position than defendant. Plaintiff advanced several of its own indefensible positions throughout the case, such as its argument that it was entitled to assert new claims at any point in the litigation.

Similarly, plaintiff accuses defendant of engaging in "gamesmanship" in discovery and the rest of the case, but its memory is highly selective. Plaintiff engaged in many of the same practices of which it now accuses defendant. For example, plaintiff refused to agree to a dismissal with prejudice of one of defendant's counterclaims unless defendant agreed to release plaintiff from liability not just *with respect* to plaintiff's current products but to all products it might manufacture in the future. Plaintiff has never attempted to justify this refusal as being grounded in a reasonable interpretation of the law.

Like § 285, the application of § 1927 is very limited. It allows a court to award attorney fees against a party "who . . . multiplies the proceedings in any case unreasonably and vexatiously." Interestingly enough, § 1927 has been raised in this court almost exclusively in the context of patent cases. E.g., Silicon Graphics, Inc. v. ATI Technologies, Inc., 569 F. Supp. 2d 1819, 822 (W.D. Wis. 2008) (denying motion for attorney fees under § 1927 in patent case); Vehicle IP, LLC v. General Motors Corp., 2008 WL 2273682, 1 (W.D. Wis. 2008) (same); Thermal Design, Inc. v. Indoor Courts of America, Inc., 2004 WL 1638180, *2 (W.D. Wis. 2004) (same); Bruno Independent Living Aids, Inc. v. Acorn Mobility Services Ltd., 277 F. Supp. 2d 965, 967 (W.D. Wis. 2003) (same).

Again, plaintiff's request for fees under § 1927 is somewhat ironic. After all, it was plaintiff that attempted unsuccessfully to expand the scope of the lawsuit just before summary judgment and then

refused to take no for an answer by filing an equally unsuccessful motion for reconsideration when its motion to amend its complaint was denied.

In short, this case was hardly a model for smooth, respectful and intelligent litigation. But the fault for the case's problems cannot be laid on defendant's door step alone. Both sides should have learned from this case how not to litigate a patent lawsuit in the future.

ORDER

IT IS ORDERED that

1. Defendant Enterasys, Inc.'s renewed motion for judgment as a matter of law, dkt. #409, and its request for a hearing on that motion, dkt. #415, are DENIED. The clerk of court is directed to enter judgment in the amount of $201,213 in favor of plaintiff on its claims that defendant's Matrix X routers have infringed claims 21 and 29 of U.S. Patent No. 6,104,700, that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 15 of U.S. Patent No. 6,678,248 and that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 5 of U.S. Patent No 6,859,438. In addition, the clerk is directed to enter judgment in favor of plaintiff on defendant's counterclaims for infringement of U.S. Patents Nos. 5,195,181 and 5,430,727.

2. The clerk is directed to enter judgment in favor of defendant on plaintiff's claims that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers infringe claim 1 of the '248 patent and claim

1 of '438 patent. These claims were dismissed by plaintiff with prejudice during the trial.

3. Plaintiff's motion for attorney fees, dkt. #412, is DENIED.

4. Plaintiff's motion for a permanent injunction, dkt. #405, is GRANTED IN PART. Defendant is ENJOINED as follows:

- Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this order are permanently enjoined from manufacturing, using, offering to sell, or selling in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products.

- Defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products within ten days of the final resolution of any appeal by defendant.

- Within ten days of this order, defendant shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them.

5. This injunction shall run until the expiration of plaintiff s patents, which is February 3, 2018, with respect to the '700 and '438 patents, and March 16, 2020, with respect to the '248 patent.

6. This court retains jurisdiction to enforce any and all aspects of this order and to award plaintiff supplemental damages, interest or costs.

Entered this 28th day of October, 2008.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EXTREME NETWORKS, INC.,

Plaintiff,

v.

ENTERASYS NETWORKS, INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

Case No. 07-cv-229-bbc

This matter came before the court and a jury with District Judge Barbara B. Crabb presiding. The issues have been tried and the jury has rendered a verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered:

1. Dismissing defendant Enterasys Networks, Inc.'s counterclaims for infringement of U.S. Patents Nos. 6,041,042, 5,195,181 and 5,430,727 with prejudice;

2. Dismissing plaintiff Extreme Networks, Inc.'s claims for invalidity of the '042, '181 and '727 patents without prejudice;

3. Limiting plaintiffs damages for infringement to those plaintiff incurred after it filed this lawsuit on April 20, 2007;

4. In favor of defendant on plaintiffs claims that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers infringe claim 1 of the '248 patent and claim 1 of the '438 patent; and

5. In favor of plaintiff Extreme Networks, Inc. against defendant Enterasys Networks, Inc. in the amount of $201,213.00 on plaintiff's claims that defendant's Matrix X routers have infringed claims 21 and 29 of U.S. Patent No. 6,104,700, that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 15 of U.S. Patent No. 6,678,248 and that the Matrix X, X-Pedition 8000 and X.-Pedition 8600 routers have infringed claim 5 of U.S. Patent No. 6,859,438.

IT IS FURTHER ORDERED AND ADJUDGED that defendant is permanently enjoined as follows:

- Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this judgment are permanently enjoined from manufacturing, using, offering to sell, or selling in the United States, or importing into the United States, that X-

Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products.

- Defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products within ten days of the final resolution of any appeal by defendant.

- Within ten days of the court's order, defendant, shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert with them.

- This injunction shall run until the expiration of plaintiff's patents, which is February 3, 2018, with respect to the '700 and '438 patents, and March 16, 2020, with respect to the '248 patent.

Approved as to form this 3d day of November, 2008.

/s/
Barbara B. Crabb
District Judge

/s/ 11-5-2008
Joel W. Turner Date
Acting Clerk of Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

EXTREME NETWORKS, INC.,

Plaintiff,

v.

ENTERASYS NETWORKS, INC.,

Defendant.

OPINION AND ORDER

07-cv-229-bbc

A jury awarded plaintiff Extreme Networks, Inc. approximately $200,000 for defendant Enterasys Networks, Inc.'s infringement of three patents relating to management of network traffic: U.S. Patents Nos. 6,104,700, 6,678,248, and 6,859,438. In an order dated October 29, 2008, I denied defendant's motion for judgment as a matter of law, granted in part plaintiff's motion for a permanent injunction and denied plaintiff's request for attorney fees. Dkt. #436. Now before the court are the following motions:

- Defendant's motion for a new trial and request for a hearing (dkt. #451);

- Defendant's motion to modify the terms on the injunction (dkt. #438);

- Plaintiff's motion to modify the terms of the injunction (dkt. #446);

- Defendant's motion to stay the injunction pending appeal (dkt. #440);

- Plaintiff's motion to strike the declaration of defendant's expert, filed in support of defendant's motions to modify and stay the injunctions (dkt. #448);

- Plaintiff's motion for supplemental damages and interest (dkt. #460).

I have stayed the injunction pending resolution of these motions. Dkt. #445.

For the reasons discussed below, I will deny defendant's motion for a new trial, plaintiff's motion to modify the injunction and plaintiff's motion to "strike" the affidavit of defendant's expert; I will grant in part defendant's motion to modify the injunction and plaintiff's motion for supplemental damages and interest; and I will grant defendant's motion to stay the injunction pending appeal.

I. Defendant's Motion for a New Trial

A court may grant a new trial if the verdict is against the clear weight of the evidence or if the trial was unfair to the moving party. David v. Caterpillar, 324 F.3d 851, 863 (7th Cir. 2003). As defendant acknowledges, many of its arguments for

a new trial are the same arguments that I rejected in the context of its Rule 50 motion. It is unnecessary to consider these arguments again. Williams v. Liefer, 491 F.3d 710, 716 (7th Cir. 2007). I consider the few remaining arguments below.

A. Testimony of plaintiff's expert

The gist of defendant's argument on this issue is that the court erred in allowing plaintiff's expert, Nathaniel Davis, to use documents prepared by plaintiff and Broadcam to give opinions about the way defendant's products functioned. This is an only slightly repackaged version of an argument it made at summary judgment and in its Rule 50 motions. Again, defendant cites no authority for the proposition that plaintiffs method of proof was inadequate as a matter of law. To the extent defendant believed that its own documents did not accurately describe how its products function, it was free to challenge Davis's conclusions with its own evidence of the actual functioning of the devices. It is not entitled to a new trial simply because the jury did not find its presentation persuasive.

Defendant also says that it was error to allow Davis to testify at all because he did not meet the standard for a person of ordinary skill in the art. This is an odd argument for defendant to be making in the context of a Rule 59 motion because it never raised the argument before. Defendant attempts to justify the untimely nature of this argument through a convoluted discussion regarding a change that plaintiff made to its proposed jury instructions for the meaning of "person of ordinary skill in the art."

This is nonsense. At no point was defendant bound by plaintiffs understanding of that term; defendant had an obligation to advocate its own view of the correct instruction. If defendant believed that Davis was not a person of ordinary skill in the art, it should have raised that issue in limine rather than wait until it was too late to do anything about it. That argument is forfeited.

B. Exclusion of defendant's expert

At the final pretrial conference, I granted plaintiffs motion to exclude the testimony of defendants' expert Barbara Fredericksen on the ground that defendant had failed to show that she was qualified to testify about issues related to this case. The materials it submitted in response to plaintiffs motion in limine simply did not provide a basis to conclude that her testimony would assist the jury in determining infringement or invalidity. My explanation for this conclusion is set forth in the final pretrial conference order, dkt. #348, and on the record at the conference. There is no need to repeat that discussion here. To the extent defendant is raising new arguments to bolster its position, it has forfeited these by failing to present them before the in limine ruling.

C. Evidentiary objections

Defendant raised two evidentiary objections in its opening brief, one related to admission of a Broadcom document "PX 633" and the other relating to the testimony of Stephen Haddock. Neither of these arguments made much sense. In any event,

defendant abandoned these objections in its reply brief by failing to discuss them at all despite a lengthy defense of the evidence by plaintiff in its brief. Cincinnati Insurance Co. v. Eastern Atlantic Insurance Co., 260 F.3d 742, 747 (7th Cir. 2001).

D. Conduct of plaintiff's counsel

Defendant argues that two actions by counsel for plaintiff during the trial entitle it to a new trial: (1) making remarks expressing "disbelief at the content of [defendant's counsel's] closing argument"; and (2) communicating with plaintiff's expert during a break. Again, defendant abandoned these arguments in its reply brief, but they are frivolous in any event. To begin with, defendant did not object to any statements counsel made during closing arguments; even if it had, there was nothing out of the ordinary about the comments of plaintiffs counsel. When counsel for defendant argued in its closing that the jury must return a verdict in defendant's favor if the jury did not understand plaintiff's evidence, counsel for plaintiff responded, unsurprisingly, that defendant did not think the jury was "smart enough" to understand the case. The jury was entitled to evaluate that characterization for itself. Although I agree with defendant that it was inappropriate for plaintiff's counsel to speak to his expert during a break, the expert testified under oath that the conversation was unrelated to the substance of his testimony. It is difficult to understand how such a conversation could have had any prejudicial effect on defendant's case.

II. Motions to Modify the Injunction

The October 29 order included the following injunction:

- Defendant, defendant's officers. agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this order are permanently enjoined from manufacturing. using, offering to sell, or selling in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products.

- Defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products within ten days of the final resolution of any appeal by defendant.

- Within ten days of this order, defendant shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them.

Both parties seek to modify the injunction. Defendant asks that it be permitted to do four things prohibited by the injunction:

> 1. Use Matrix X routers and X-Pedition routers, either those at its own facility or those of its customers, to perform diagnostic testing as part of providing customer service to its past/existing customers who identify problems with these products to Enterasys;
>
> 2. Use Matrix X routers and X-Pedition routers in Enterasys' own internal network;
>
> 3. Allow Enterasys to sell Matrix X routers to third party resellers, where those products are to be resold to the federal government; and
>
> 4. More generally, allow Enterasys to use Matrix X routers and X-Pedition routers in the United States.

Dkt. #439, at 2. Plaintiff's motion is the inverse of defendant's first request. Plaintiff wishes to expand the injunction so that defendant is enjoined from selling, making or using "component, repair or replacement parts for the Infringing Products or repair or maintenance services for the Infringing Products."

Defendant's first two requests are reasonable modifications. Plaintiff is simply twisting the knife by objecting to these requests and seeking to prevent

defendant from servicing customers and using its products internally. Plaintiff identifies no harm that it will suffer if the injunction is modified in these ways; its only benefit is to cripple defendant in maintaining relationships with its customers and make it more difficult generally for defendant to conduct business. The purpose of an injunction is not to punish the defendant but to prevent irreparable harm to the plaintiff. Because plaintiff identifies no such harm with respect to defendant's first two requests, I will grant that part of defendant's motion and deny plaintiff's motion to modify the injunction.

Defendant's third and fourth requests for modification will be denied. With respect to its fourth request, defendant fails to identify any legitimate "use" of the infringing products that is not covered by its first and second requests. Thus, that request will be denied as unnecessary. Defendant relies on 28 U.S.C. § 1498(a) for its third requested modification: permission "to sell Matrix X routers to third party resellers, where those products are to be resold to the federal government." Under that statute, a patent owner may not sue for infringement in federal district court when an infringing produced "is used or manufactured by or for the United States." Rather, the owner must seek compensation in federal claims court against the United States.

Defendant concedes that, ordinarily, it is unnecessary to include an exception for the federal government in an injunction because the Court of Appeals for the Federal Circuit has held that § 1498(a) trumps whatever the injunction says: "The

patentee takes his patent from the United States subject to the government's eminent domain rights to obtain what it needs from manufacturers and to use the same." W.L. Gore &Associates, Inc. v. Garlock, Inc., 842 F.2d 1275, 1283 (Fed Cir. 1988). Defendant argues that a modification is needed in this case because most of its sales "to" the government "frequently occur via a reseller and/or distributor to whom Enterasys first sells the product, and who then sells those products to the government." Dkt. #439, at 12.

Defendant's argument is not so much one about the proper scope of the injunction but rather the proper interpretation of § 1498(a). The question is whether a sale to a third party can qualify as one that is "for" the United States. If it does, then § 1498(a) applies and no modification to the injunction is needed. If it does not, then defendant would not be entitled to a modification of the injunction. In any event, defendant fails to develop an argument that § 1498(a) should be extended to cover third party sales. Accordingly, I will deny its request for this modification.

III. Motion to Stay the Injunction

Defendant seeks a stay of the injunction pending resolution of any appeal that it files. This requires a balancing of the harms that defendant will incur if the motion is denied and that plaintiff will incur if the motion is granted. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). In support of its motion, defendant cites the affidavit of its director of product management, who avers that many employees are

devoted to the Matrix X router, including engineers, technicians, marketers and sales associates; these jobs will disappear if the injunction issues; and the absence of the Matrix X will make it harder to market its other products and maintain customer relationships. Ottoman Aff. n26-30, dkt. #442.

Plaintiff does not deny that defendant will suffer a great hardship without a stay and develops no argument regarding any harm it will suffer if a stay is granted. Instead, plaintiff argues in its motion to strike the Ottoman affidavit that defendant waived this issue by failing to submit Ottoman's affidavit in opposition to plaintiff's motion for a permanent injunction. That argument makes little sense. Although there is some overlap in the questions whether a plaintiff is entitled to a permanent injunction and whether the defendant should receive a stay of the injunction on appeal, the two questions obviously arise at different stages of the case and require different analyses.

For starters, the harm to the defendant is less important in the context of a motion for a permanent injunction. As stated in the case plaintiff cites: "One who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected." Windsurfing International Inc. v. AMF, Inc., 782 F.2d 995, 1003 (Fed. Cir. 1986). However, the analysis changes in the context of a request for a stay on appeal because of the chance for reversal. The harms defendant describes are of the type that could leave a significant impact on its business even if it prevails on appeal.

Although I disagree with defendant's challenges to the jury's verdict, the court of appeals may see things differently. Accordingly, I will grant defendant's motion for a stay of the injunction pending appeal.

IV. Motion for Supplemental Damages and Interest

The parties agree that plaintiff is entitled to supplemental damages and interest and they agree on the rate of that interest, but they disagree about the amount of damages. Plaintiff says that it is entitled to an additional $82,981 in supplemental damages; defendant says that plaintiff is entitled to supplemental damages of $48,304. The parties agree on a prejudgment daily interest rate of .0134% and a postjudgment daily interest rate of .0039%. (Plaintiff says that "discovery of additional sales from Enterasys will reveal additional sales that may need to be included in an amended judgment," dkt. #460, at 2, but plaintiff has waived that issue by failing to file a separate motion to compel before filing its motion for supplemental damages.)

Defendant has explained each of its objections in its brief, but plaintiff's brief includes no argument in support of its figure on damages. Because plaintiff has the burden on this issue, I will accept defendant's number.

ORDER

IT IS ORDERED that

a. Defendant Enterasys Networks, Inc.'s motion for a new trial and request for a hearing, dkt. #451, is DENIED.

b. Defendant's motion to modify the permanent injunction, dkt. #438, is GRANTED IN PART. The injunction is AMENDED to allow defendant to use Mattix X routers and X-Pedition routers: (1) to perform diagnostic testing as part of providing customer service to its customers who identify problems with these products to defendant; and (2) in defendant's own internal network. Defendant's motion to modify the injunction is DENIED in all other respects.

c. Plaintiff's motion to modify the injunction, dkt. #446, is DENIED.

d. Under the amended injunction, defendant is ENJOINED as follows:

(i) Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this order are permanently enjoined from manufacturing, offering to sell, or selling in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix

X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products;

(ii) Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this order are permanently enjoined from using in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products, except that defendant may continue (1) to perform diagnostic testing as part of providing customer service to its customers who identify problems with these products to defendant; and (2) use the infringing products in defendant's own internal network.

(iii) With the exception of those products used in conjunction with paragraph

5(b), defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products within ten days of the final resolution of any appeal by defendant.

(iv) Also within 10 days of the resolution of appeal, defendant shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them.

e. Defendant's motion to stay the injunction pending appeal, dkt. #440, is GRANTED; plaintiff's motion to strike the declaration of defendant's expert, filed in support of defendant's motions to modify and stay the injunctions, dkt. #448, is DENIED. The injunction is STAYED pending resolution of defendant's appeal.

f. Plaintiff's motion for supplemental damages and interest is GRANTED IN PART. Plaintiff is awarded $48,304 in supplemental damages; $15,297 in prejudgment interest; and postjudgment interest at a rate of $10.38 a day.

g. The clerk of court is directed to enter an amended judgment accordingly.

Entered this 16th day of March, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EXTREME NETWORKS, INC.,

Plaintiff,

AMENDED JUDGMENT IN A CIVIL CASE

v.

Case No. 07-cv-229-bbc

ENTERASYS NETWORKS, INC.,

Defendant.

This matter came before the court and a jury with District Judge Barbara B. Crabb presiding. The issues have been tried and the jury has rendered a verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered:

1. Dismissing defendant Enterasys Networks, Inc.'s counterclaims for infringement of U.S. Patents Nos. 6,041,042, 5,195,181 and 5,430,727 with prejudice;

2. Dismissing plaintiff Extreme Networks, Inc.'s claims for invalidity of the '042, '181 and '727 patents without prejudice;

3. Limiting plaintiffs damages for infringement to those plaintiff incurred after it filed this lawsuit on April 20, 2007;

4. In favor of defendant on plaintiffs claims that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers infringe claim 1 of the '248 patent and claim 1 of the '438 patent;

5. In favor of plaintiff Extreme Networks, Inc. against defendant Enterasys Networks, Inc. in the amount of $201,213.00 on plaintiff's claims that defendant's Matrix X routers have infringed claims 21 and 29 of U.S. Patent No. 6,104,700, that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 15 of U.S. Patent No. 6,678,248 and that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 5 of U.S. Patent No. 6,859,438; and

6. In favor of plaintiff Extreme Networks, Inc. against defendant Enterasys Networks, Inc. in the amount of $48,304.00 in supplemental damages; $15,297.00 in prejudgment interest; and postjudgment interest at a rate of $10.38 a day.

IT IS FURTHER ORDERED AND ADJUDGED that defendant is permanently enjoined as follows:

A. Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this judgment are permanently enjoined from manufacturing, offering to sell, or selling in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products;

B. Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them, who receive actual notice of this judgment are permanently enjoined from using in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products, except that defendant may continue (1) to perform diagnostic testing as part of providing customer service to its customers who identify problems with these products to defendant, and (2) use the infringing

products in defendant's own internal network.

C. With the exception of those products used in conjunction with paragraph (b), defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products within 10 days of the final resolution of any appeal by defendant.

D. Also within 10 days of the resolution of any such appeal, defendant shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them.

E. The injunction shall run until the expiration of plaintiff's patents, which is February 3, 2018, with respect to the '700 and '438 patents, and March 16, 2020, with respect to the '248 patent.

Approved as to form this 18th day of March, 2009.

/s/
Barbara B. Crabb
District Judge

/s/
Peter Oppeneer
Clerk of Court

3/19/2009
Date

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-1325, -1346
EXTREME NETWORKS, INC.,
Plaintiff-Cross Appellant,

v.

ENTERASYS NETWORKS, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Western District of Wisconsin in case no. 07-CV-229, Chief Judge Barbara B. Crabb.

ORDER

NOTE: THIS ORDER IS NONPRECEDENTIAL.

A combined petition for panel rehearing and for rehearing en banc having been filed by the Cross-Appellant, and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 12/20/2010

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-1325, -1346
EXTREME NETWORKS, INC.,
Plaintiff-Cross Appellant,

v.

ENTERASYS NETWORKS, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Western District of Wisconsin in case no. 07-CV-229, Chief Judge Barbara B. Crabb.

ORDER

NOTE: THIS ORDER IS NONPRECEDENTIAL.

Before Rader, Chief Judge, Lourie, Circuit Judge, and Prost, Circuit Judge.

A petition for rehearing having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Cross-Appellant,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on January 5, 2011.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 12/29/2010